No. 81-746

Office - Supreme Court, U.S.
FILED
AUG 2 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF AKRON,

Petitioner,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF AMICUS CURIAE OF FEMINISTS FOR LIFE IN SUPPORT OF PETITIONER, CITY OF AKRON

DOLORES V. HORAN
180 N. LaSalle #1601
Chicago, IL 60601
(312) 822-4554
Attorney for Feminists for Life

Of Counsel:
Americans United for Life
Legal Defense Fund
230 N. Michigan, Suite 915
Chicago, IL 60601
312/263-5029

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-8581

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Interest of the Amicus	1
Summary of the Argument	2
Argument	5
I. Introduction	5
II. The Fundamental Right Recognized in *Roe* v. *Wade* Was The Right Of A Pregnant Woman To Decide Whether Or Not To Terminate Her Pregnancy; The Physician Can Claim No Right To Withhold Information Necesary To Her Informed Consent	7
III. Factual Information Which Promotes An Intelligent, Knowing And Voluntary Decision By A Pregnant Woman Enhances That Woman's Ability To Exercise Her Fundamental Right To Decide Whether Or Not To Terminate Her Pregnancy	10
IV. The State May Legitimately Require That A Woman Be Given Sufficient Information To Enable Her To Decide Intelligently, Knowingly And Voluntarily Whether Or Not To Terminate Her Pregnancy	16
A. The State Has Not Only the Power But a Duty to Protect the Fundamental Rights of Its Citizens	16
B. Requiring That the Doctor Give Supplementary Factual Information When Counseling a Woman Does Not "Straightjacket" Him In the Practice of His Profession	20

PAGE

V. Lower Court Decisions Which Have Invalidated Informed Consent Provisions Are Inconsistent With The Decisions Of This Court 22

VI. A Short Mandatory Waiting Period Enhances The Woman's Ability To Decide By Allowing Her Time To Evaluate Information Which She Has Been Given 25

VII Even If Strict Scrutiny Were Applied, The State's Compelling Interest In Assuring The Integrity Of The Woman's Decision Would Justify Its Regulations Which Are Narrowly Drawn To Further That Interest 27

A. The State has a Compelling Interest in Assuring that the Woman's Decision Is Made Intelligently, Knowingly and Voluntarily 27

B. These Informed Consent Provisions Further the State's Compelling Interest and are Narrowly Drawn 28

VIII. Conclusion 29

Appendix ..... App. 1

TABLE OF AUTHORITIES

Cases

PAGE

Adams v. U.S. ex rel. McCann, 317 U.S. 269 (1942) 28

Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172 (N.D. Ohio 1979), aff'd 651 F.2d 1198 (6th Cir. 1981) 25

Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (6th Cir. 1981) 8, 10, 18

Barsky v. Board of Regents of University of State of N.Y., 347 U.S. 442 (1954) 17

Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II) 24, 26

Carnley v. Cochran, 369 U.S. 506 (1962) 28

Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) ..8, 10, 12, 18

Doe v. Bolton, 410 U.S. 179 (1973) 3, 18

Eisenstadt v. Baird, 405 U.S. 438 (1972) 7

Freiman v. Ashcroft, 584 F.2d 247 (8th Cir. 1978), aff'd 440 U.S. 941 (1979) 15, 22

H. L. v. Matheson, 450 U.S. 398 (1981) 26

Harris v. McRae, 448 U.S. 297 (1980) 8, 11, 14, 15, 24

Hodgson v. Minnesota, No. 3-81 Civ. 538 (D. Minn., Mar. 23, 1982) (order granting preliminary injunction in part) 26

Maher v. Roe, 432 U.S. 464 (1977) 14, 27

Miranda v. Arizona, 384 U.S. 436 (1966) 28

Planned Parenthood v. Bellotti, 641 F.2d 1006 (1st Cir. 1981) 10, 11, 15, 25

PAGE

Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976) 8, 13, 20, 22, 23, 24

Planned Parenthood Association v. Fitzpatrick, 410 F.Supp. 554 (E.D. Pa. 1975), aff'd 428 U.S. 901 (1976) 22, 24, 25

Planned Parenthood Association of Kansas City, Mo., v. Ashcroft, 655 F.2d 848 (8th Cir. 1981) 8, 18

Planned Parenthood League v. Bellotti, 499 F.Supp. 215 (D. Mass.), aff'd in part, vacated in part 641 F.2d 1006 (1980) 10, 11, 20, 25

In the Matter of R.M.J., 102 S.Ct. 929 (Jan. 25, 1982) .. 21

Roe v. Wade, 410 U.S. 113 (1973) ..3, 6, 7, 8, 9, 14, 17, 18, 23

Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 18, 19

Whalen v. Roe, 429 U.S. 589 (1977) 7, 9, 18

STATUTES & ORDINANCES

Akron, Ohio, Ordinance No. 160, chap. 1870.06(C) 21

Del. Code Ann. tit. 24 §1794 (Supp. 1980) ..... App. 1

Fla. Stat. §390.025(2) (Supp. 1981) ..... App. 2

Idaho Code §18-609(1) (Supp. 1981) ..... App. 2

Ill. Rev. Stat. ch. 38, §81-23.2 (1981) ..... App. 3, 6

Ill. Rev. Stat. ch. 40, §207 (1981) 26

Ill. Rev. Stat. ch. 40, §1511 (1981) 26

"Kentucky Abortion Act of 1982" March 17, 1982 Ky. Acts §311.4 ..... App. 7

"Kentucky Abortion Act of 1982" March 17, 1982 Ky. Acts §311.5 ..... App. 9

PAGE

La. Rev. Stat. Ann. §40:1299.35.6 (West Supp. 1981) App.10

Me. Rev. Stat. Ann. tit. 22, §1599 (Supp. 1981) .....App. 12

Md. Ann. Code art. 43, §138 (1980) .....App. 13

Mass. Ann. Laws ch. 112, §125 (Michie/Law, Co-op. Supp. 1982) .....App. 15

Minn. Stat. Ann. §145.412(1)(4) (West Cum. Supp. 1981) .....App. 17

Mo. Ann. Stat. §188.039 (Vernon Supp. 1982) .....App. 18

Mont. Code Ann. §50-20-104(3) (1981) .....App. 19

Mont. Code Ann. §50-20-106 (1981) .....App. 20

Neb. Rev. Stat. §28-326 (1981) .....App. 21

Neb. Rev. Stat. §28-327 (1981) .....App. 21

Nev. Rev. Stat. §442.253 (1981) .....App. 22

N.D. Cent. Code §14-02.1-02(5) (1981) .....App. 23

Ohio Rev. Code Ann. §2919.12(A) (Page 1982) .....App. 25

Ohio Rev. Code Ann. §3107.8 (Page 1982) 26

Okla. Stat. Ann. tit. 63, §1-736 (West Supp. 1981-1982) .....App. 25

Pa. Act of June 15, 1982, Pa. Laws .....App. 26

R.I. Gen. Laws §23-4.7-2 (1980) .....App. 28

R.I. Gen. Laws §23-4.7-4 (1980) .....App. 30

S.D. Codified Laws Ann. §34-23A-10 (1977) .....App. 30

S.D. Codified Laws Ann. §34-23A-10.1 (Supp. 1981) App. 30

Tenn. Code Ann. §39-302 (Supp. 1981) .....App. 31

Utah Code Ann. §76-7-305 (1979) .....App. 35

PAGE

Utah Code Ann. §76-7-305.5 (Supp. 1981) ..... App. 35

Va. Code §18.2-76 (1982) ..... App. 37

OTHER AUTHORITIES

Chicago Sun-Times, The Abortion Profiteers 1978 (Special reprint) 16-17

Fed. R. Crim. Proc. Rule 11 28

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-746

CITY OF AKRON,

Petitioner,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF FEMINISTS FOR LIFE IN SUPPORT OF PETITIONER, CITY OF AKRON

INTEREST OF THE AMICUS

Feminists for Life is a national organization with several state chapters. It was founded in 1972 by pro-life feminists to be a source of education and support for women. Its members reject a feminism which is materialistic and narcissistic and embrace a loving, nurturing posture of non-violence in relating to all members of the human family—including the unborn. The national office of Feminists for Life is located in Milwaukee, Wisconsin.

The officers of Feminists for Life include the following:

President
PAULINE M. CIRA

Vice-President
MARY LEDBETTER

Secretary-Treasurer
SHARON RICHARDSON

Newsletter Coordinator
MARY BEA STOUT

This brief is filed in support of Petitioner City of Akron. Letters of consent for the filing of this brief have been sent to this Court by both the Petitioners and Respondent.

SUMMARY OF THE ARGUMENT

Most abortions are performed at abortion clinics. Recent exposés of clinic practices have revealed widespread abuses in counseling. Essential information is often withheld from women, or misleading and inaccurate information disseminated.

Twenty-four of the 50 states have enacted corrective legislation in the form of abortion informed consent statutes. These statutes typically require that a minimum level of essential factual information be provided to pregnant women considering abortions so that they may, in a meaningful manner, exercise their fundamental right to decide whether or not to terminate their pregnancy. Three general categories of information are included in the typical informed consent statute: information on particular risks associated with the abortion procedure to be performed, information on agencies available to assist women during and after pregnancy, and information on fetal development. Many statutes also provide for a short mandatory waiting period to allow the woman to evaluate and reflect upon the information which she has been given.

Factual information of this kind unquestionably enhances the woman's ability to decide knowingly. It may also protect her from severe psychological trauma which she may experience upon later discovery of that information. Because this information does not burden the woman's decision-making capability, it is subject to rational basis review rather than strict scrutiny.

The promotion of irrational decisions constitutes the sole reasonable possibility of a "burden" in the context of informed consent provisions. Of course, the state may not attempt to require false, misleading or confusing information since such information would not further the state's legitimate interest in assuring the integrity of the woman's decision.

Several lower courts have placed the doctor on a pedestal and have given him broad discretion to withhold any information which he feels the woman should not have. These courts have invalidated informed consent statutes which require that specific factual information be given solely because the doctor believes such information should be withheld from the woman.

This Court never intended such a result. In *Roe* v. *Wade* and *Doe* v. *Bolton*, the Court prohibited the state from regulating doctors only in ways which *burden* the woman's fundamental right to decide. It is impossible for the state to burden the woman's right to decide by requiring that she be given factual information which, in fact, *enhances* her ability to decide. Thus, the state may require that the doctor give the woman factual information which enables her to make a knowing, intelligent and voluntary decision. The state has a duty to protect its pregnant citizens from the "paternalistic" attempts of doctors to keep them in ignorance. Through its licensing procedures, the state has empowered physicians to give professional advice on the advisability of an abortion. Having placed the physician in this position of responsibility, the state has the power and duty to correct his actions when they are irresponsible.

This Court has only ruled on the constitutionality of abortion informed consent provisions in three cases. Those decisions indicate that the rational basis test is appropriate. However, the lower courts have routinely applied strict scrutiny to these provisions. This is an inappropriate standard because such provisions do not burden the woman's right to decide.

The right of a pregnant woman to decide the outcome of her pregnancy encompasses two distinct fundamental rights: 1) the right to terminate her pregnancy, and 2) the right to bear her child. Therefore, in exercising one

of these fundamental rights, a woman necessarily waives another fundamental right of equal importance. The state has a compelling interest in ensuring that such an important decision is made knowingly, intelligently and voluntarily.

The state ned not fine-tune its statutes so as to facilitate abortions. Although some women may already know of this information, it would be impossible for the state to determine beforehand which women would be benefitted by this information and which would not. Thus, the statutes are narrowly drawn to serve the state's compelling interest in assuring that the woman's decision is made knowingly, intelligently and voluntarily.

ARGUMENT

I.

INTRODUCTION

The purpose of this brief is to explore the constitutional aspects of state abortion informed consent legislation—legislation which is intended to insure the integrity of the woman's decision-making process prior to abortion.

At present, 24 of the 50 states have enacted legislation which requires that women be provided with certain information prior to undergoing an abortion. *See generally*, Appendix.

Nineteen states specifically provide that the woman must be given information on the medical risks of abortion.* Eighteen states require that the woman be apprised of the alternatives to abortion,** and several require that she be informed of the identity of agencies that would assist her to carry her child to term. Thirteen states require that the woman be informed of the characteristics of the fetus at the time the abortion is contemplated.*** At least 11 states mandate that some period of time elapse between the time when information is provided and the time when the abortion is performed.****

---

* Delaware, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, and Virginia.

** Delaware, Florida, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Tennessee, and Utah.

*** Delaware, Idaho, Illinois, Kentucky, Louisiana, Massachusetts, Missouri, Montana, North Dakota, Oklahoma, Rhode Island, South Dakota, and Utah.

**** Delaware, Illinois, Kentucky, Maine, Massachusetts, Missouri, Nebraska, Pennsylvania, South Dakota, Tennessee, and Utah.

It is apparent that in the ten years that have elapsed since this Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973), many states have felt a compelling need to assure the integrity of the woman's abortion decision-making process.

Although varied in form, the informed consent laws are a clear manifestation of a specific legislative concern: that women contemplating a decision involving termination of fetal life and waiver of their fundamental right to continued childbearing should be provided with information that would permit them to make their decisions in a voluntary, knowing and intelligent fashion.

These states have adjudged that, in the absence of such legislation, the woman's right to make an informed abortion decision is not adequately protected. Present abortion practice militates against providing the woman with the full information she requires to make a competent abortion decision. This circumstance may be attributed to at least two causes: the strong economic impetus to persuade women to submit to abortion that naturally occurs in the clinic that relies exclusively on performing abortions in order to survive as a business entity and the impersonal, assembly-line fashion in which most abortions are performed.

Whatever the reasons, it is evident that legislatures in nearly half of the states have expressed an interest in assuring the integrity of the woman's abortion decision compelling enough to move them, in a very short period of time, to enact legislation in this area.

Such legislation should not be judged by this Court in the same manner as laws that effectively inhibit or prohibit effectuation of abortion decisions. In a technical sense, abortion informed consent laws may "impact" upon the right to decide whether or not to abort. But they *enhance*,

rather than vitiate the decision-making process of the woman, at least insofar as they provide objective information that may materially effect the outcome of the woman's decision. For this reason, such legislation should not be deemed inherently "suspect" and, thus, subject to strict judicial scrutiny. The various provisions of informed consent statutes should be sustained if they are relevant to the outcome of the pregnant woman's decision and reasonably promote an intelligent, knowing and voluntary decision.

II.

THE FUNDAMENTAL RIGHT RECOGNIZED IN ROE v. WADE WAS THE RIGHT OF A PREGNANT WOMAN TO DECIDE WHETHER OR NOT TO TERMINATE HER PREGNANCY; THE PHYSICIAN CAN CLAIM NO RIGHT TO WITHHOLD INFORMATION NECESSARY TO HER INFORMED CONSENT.

Although the right of privacy is not explicitly mentioned in the Constitution, this Court has recognized a limited right of personal privacy which is secured by the Fourteenth Amendment. This right of personal privacy includes "the interest in *independence* in making certain kinds of important decisions." *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977) (emphasis added). In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), this Court stated:

> If the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453 (emphasis in original).

Similarly, *Roe* v. *Wade* held that the Constitution protects "a *woman's decision* whether or not to terminate

her pregnancy." 410 U.S. at 153 (emphasis added). *See also Harris* v. *McRae*, 448 U.S. 297, 315 (1980) (constitutional right recognized in *Roe* was woman's freedom of choice).

In making her decision whether or not to terminate her pregnancy, a woman may consult such individuals as her spouse, parents or physician. Yet, whatever interests other individuals may have, it is clear that they do not possess the right to make the woman's decision for her. The only right which this Court recognized in *Roe* to be constitutionally protected was the *woman's* right to decide. This Court has consistently invalidated every attempt by a state to vest the decision in a party other than the pregnant woman when she is competent to decide for herself. *See, e.g., Planned Parenthood of Central Mo.* v. *Danforth*, 428 U.S. 52, 67-75 (1976) (spousal and parental consent invalidated).

Implicit in challenges to the various informed consent provisions which have been enacted is the theory that the *woman's* right to decide is somehow burdened by statutory schemes that do not permit the aborting *physician* to withhold certain information which he believes would "disturb" the woman, would make it less likely that the woman would choose abortion, or would complicate the physician's task of performing the abortion. *See, e.g., Planned Parenthood Association of Kansas City, Mo.* v. *Ashcroft*, 655 F.2d 848 (8th Cir. 1981) (state may not interfere with the judgment and advice of the doctor); *Charles* v. *Carey*, 627 F.2d 772 (7th Cir. 1980) (state must allow doctor to withhold any information, if the doctor feels that that information may distress the woman or cause her to forego an abortion); *Akron Center for Reproductive Health* v. *City of Akron*, 651 F.2d 1198, 1207 (6th Cir. 1981) (informed consent provisions were unconstitutional because they "imping[e] on the medical judgment of the attending pjhysician" by "re-

quir[ing] the doctor to make certain disclosures in all cases, regardless of his own professional judgment as to the desirability of doing so").

According to this line of reasoning, statutory shemes which require that the physician provide all women with certain information are, in effect, unconstitutionally overbroad because they do not permit the physician to withhold information from women according to his "medical judgment."

This theory is inherently defective, however, because the right acknowledged in *Roe* is exclusively the right of the woman to decide whether or not to terminate pregnancy. The Constitution does not vest the physician with the paternalistic authority to withhold information that may be otherwise material to the outcome of a woman's abortion decision.

Expansion of the right of privacy recognized in *Roe* to include a right of a physician to, in effect, exercise the woman's fundamental right to decide for her as though she were an incompetent must not be tolerated by this Court. The physician can no more claim that the Constitution grants him a "right" to withhold information from a woman that may be necessary to her competent and independent abortion decision than a husband or parent can claim a "right" to deny the woman the power to effectuate the abortion decision.

As this Court has held, any "right" the physician might claim in this area derives solely from the *woman's* right to decide whether or not to terminate pregnancy. *Whalen* v. *Roe*, 429 U.S. 589 (1977). Informed consent statutes which provide women with information that would assist them to make a rational abortion decision enhance, rather

than burden, the woman's freedom of choice. Since the woman's right is not burdened by informed consent provisions, the physician can claim no derivative right to withhold such information from her.

III.

FACTUAL INFORMATION WHICH PROMOTES AN INTELLIGENT, KNOWING AND VOLUNTARY DECISION BY A PREGNANT WOMAN ENHANCES THAT WOMAN'S ABILITY TO EXERCISE HER FUNDAMENTAL RIGHT TO DECIDE WHETHER OR NOT TO TERMINATE HER PREGNANCY.

Factual information which is relevant to the outcome of the woman's decision and reasonably promotes an intelligent, knowing and voluntary decision enhances the woman's ability to exercise her fundamental right to decide.

The Court of Appeals for the First Circuit correctly noted in *Planned Parenthood* v. *Bellotti,* 641 F.2d 1006, 1019 (1st Cir. 1981), that "the promotion of irrational decisions constitutes the sole reasonable possibility of a burden" in the context of informed consent provisions.

In spite of this rather obvious fact, several lower courts have routinely invalidated informed consent provisions requiring that factual information be given to the woman.

The Sixth Circuit invalidated all those provisions of the Akron informed consent provision which required that specific factual information be supplied to the woman. *Akron Center for Reproductive Health* v. *City of Akron,* 651 F.2d 1198, 1206-1208 (6th Cir. 1981). Other circuits have approached such requirements in a piecemeal fashion. In *Charles* v. *Carey,* 627 F.2d 772, 783-784 (7th Cir. 1980), for example, the court struck information on fetal development, while sustaining information on abortion risks and

alternatives. It was not the court's intention to confine itself to upholding purely medical information pertaining to maternal health risks, for it upheld the requirement that the woman be provided with a list of abortion alternatives agencies. Yet the court also struck non-medical information on fetal development. In a similarly arbitrary fashion, the court of appeals in *Planned Parenthood* v. *Bellotti*, 641 F.2d 1006, 1016-1022 (1st Cir. 1981), upheld provisions for risks and abortion alternatives information, yet struck the requirement that the women be given information on fetal development.

There appears to be no logical basis for the distinctions drawn by the lower courts between the kinds of information offered to the woman. Information on fetal development, for example, may be no more or less "disturbing" than information on some of the serious medical risks that may attend abortion. But at least one court has held that information on fetal development, no matter how innocuous and objective, must be excluded from informed consent legislation while also holding that information on medical risks, no matter how potentially serious or troubling to the woman, might be included. *Planned Parenthood* v. *Bellotti*, 641 F.2d at 1016-1022. On what constitutionally cognizable basis can one sort of information be deemed permissible, but the other utterly impermissible?

Information on fetal development may lie at the heart of the woman's decision. It is the very existence of the fetus which has necessitated the choice, and it is the purposeful termination of that fetal life which makes the abortion decision uniquely stressful. *Harris* v. *McRae*, 448 U.S. 297, 325 (1980). It is difficult to see how a woman can make an informed abortion decision if she is unaware of the nature of fetal development.

In addition to enabling the woman to make a meaningful choice, information on fetal development may protect her

from the trauma which she may later experience because of an improvident and uninformed decision in this regard. It is evident that many women are unaware of the degree of fetal development at the time of their abortion, and that they would not have had an abortion had they been aware of this information. These women could be spared the severe guilt and trauma which they will later experience upon discovering this information. For example, in her Affidavit, in *Charles* v. *Carey*, No. 79-C-4541 (N.D. Ill., filed July 9, 1982), Cindy Lietz stated:

> The entire counseling session was very impersonal. We were given a brief explanation of the abortion procedure and birth control. At no point were we told of the maturity or growth of our unborn child and no mention was ever made of anything alive within us. The fetus was always referred to as the "contents of the uterus."

Id. at para. 7.

> It seemed to me that the personnel at the clinic treated us as if we all had our minds made up to have an abortion. Had I been given any information on the stage of development of my unborn baby, I would not have consented to the abortion. Such information would have impressed upon me the true nature of my child. It was not simply "contents of the uterus." It was already alive and developing and I was left in ignorance of that fact. Someone should have told me what my unborn baby was like and then let me make an educated decision about whether or not I wanted the abortion. Keeping me in ignorance like that made me do something which I have regretted to this day. I believe that those people at the clinic took advantage of our vulnerability in such a delicate situation.

Id. at para. 9.

> After the abortion I started reading books on fetal development. I discovered information that I did not know before the abortion. I learned that at ten weeks

> duration (the stage at which my pregnancy was aborted) my baby had eyes and ears, a beating heart, little lung buds, a spinal cord, nerves and blood vessels, cartilage, arms and legs with little fingers and toes starting to appear. If the doctor had explained to me the degree to which my unborn child was developed, I would have walked right out of the clinic.

Id. at para. 14.

> Until I read about fetal development on my own, I didn't really know what I had let them do to me. I was horrified when I realized what had happened. The abortion changed my life and nearly destroyed me.

Id. at para. 16.

Factual information on fetal development, alternatives agencies, and risks associated with the abortion procedure unquestionably enhances the woman's decision-making authority. It does not burden her decision-making capability and is subject only to rational basis review, not strict scrutiny.

To treat informed consent provisions in the same manner as provisions which burden the woman's right to decide would contravene this Court's decision in *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U.S. 52, 90 (1976) (Stewart and Powell, JJ., concurring) (informed consent provisions "aimed at ensuring that the abortion decision is made in a knowing, intelligent and voluntary fashion" may be treated differently from "state law[s] aimed at thwarting a woman's decision to have an abortion").

Lower courts which have invalidated such provisions as somehow "burdensome" have adopted an untenable position. Factual information of this kind can be said to burden a woman's ability to make a rational choice only if one presumes that abortion is the only rational choice which a pregnant woman could make. Under such a pre-

sumption, any information which makes the woman's decision more difficult or leads her to forego an abortion altogether would constitute a "burden" on her ability to make a "rational" choice.

Once again, this line of reasoning misconceives the nature of the fundamental right recognized in *Roe* v. *Wade*. *See Maher* v. *Roe*, 432 U.S. 464, 473-474 (1977). The right protected is the "woman's right to decide whether *or not* to terminate her pregnancy." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973) (emphasis added). The woman need not choose to abort in order to have exercised her fundamental right to decide. Rather, the successful exercise of this right depends on the extent to which the woman possesses sufficient information to make an informed choice between two alternatives of great consequence: carrying her child to term or terminating her pregnancy.

This overreaching by the lower courts is not to be tolerated. It infringes on the legislative prerogative of the states and forces them to stand idly by while their citizens are subjected to an abusive practice by which material information is withheld from women during their abortion decision-making process. Moreover, such an arbitrary and capricious posture toward the elements of informed consent legislation suggests a non-neutral stance on the part of the judiciary in favor of abortion. As this Court held in *Harris* v. *McRae*,

> It is not the mission of this Court or any other to decide whether the balance of competing interests reflected [in legislation] is wise social policy . . . [w]e cannot, in the name of the Constitution, overturn duly enacted statutes simply "because they may be unwise, improvident, or out of harmony with a particular school of thought." Rather, "when an issue involves

> policy choices as sensitive as those implicated [here] . . . , the appropriate forum for their resolution in a democracy is the legislature.

448 U.S. 297, 326 (1980) (citations omitted).

Of course, false, misleading or confusing information would not promote an intelligent, rational decision. Such information is not reasonably related to the state's legitimate interest in assuring the integrity of the woman's abortion decision and might properly be stricken. *Freiman* v. *Ashcroft*, 584 F.2d 247, 257 (8th Cir. 1978), *aff'd.* 440 U.S. 941 (1979) ("meaningless" information is "not reasonably related to the purpose of informed consent").

Likewise, it is conceivable that information which is highly emotionally charged and designed to bias the woman's decision may detract from her rational decision-making ability. As the court of appeals in *Planned Parenthood* v. *Bellotti* suggested, the familiar probative/prejudicial standard of the Federal Rules of Evidence is a useful tool for determining whether a challenged provision promotes a rational decision and is, therefore, reasonably related to the state's important interest in assuring the integrity of the woman's decision. Under this test, for example, a state could be prevented from requiring that a woman be shown gory pictures of aborted fetuses, as opposed to being provided with an objective and scientifically accurate description of fetal development, since the former would not further a rational decision. Similarly, excessive amounts of information which, although relevant and probative, is merely cumulative could not be required under this test.

It must be concluded that any element in abortion informed consent legislation that would materially affect the outcome of the woman's decision without being merely inflammatory or cumulative enhances, rather than burdens, the woman's decision-making ability. As such, abortion

informed consent legislation must not be subjected to strict judicial scrutiny—each element in such legislation must be upheld if it materially contributes to the rational decision-making process of the woman.

IV.

THE STATE MAY LEGITIMATELY REQUIRE THAT A WOMAN BE GIVEN SUFFICIENT INFORMATION TO ENABLE HER TO DECIDE INTELLIGENTLY, KNOWINGLY AND VOLUNTARILY WHETHER OR NOT TO TERMINATE HER PREGNANCY.

A. The State Has Not Only the Power But a Duty to Protect the Fundamental Rights of Its Citizens.

Through its licensing procedures the state empowers physicians to give professional advice to pregnant women on the advisability of undergoing an abortion. Having placed the physicians in this position of responsibility, the state has not only the power but a duty to protect its citizens by ensuring that these physicians act responsibly.

Recent exposés of widespread abuses regarding either 1) the total withholding of essential information, or 2) the dissemination of misleading or inaccurate information, have prompted several legislatures to enact corrective legislation in the form of informed consent provisions. The comments of State Representative Kelly, sponsor of the Illinois abortion informed consent law, are illustrative of these concerns:

> As the *Sun Times** series noted, most abortion clinics provide little or no counseling to women about to un-

---

* This series, entitled *The Abortion Profiteers*, reported the results of a five month undercover investigation of Chicago abortion clinics which was conducted in cooperation with the Better Government Association. Pamela Zekman received a Pulitzer Prize for her investigative reporting in this series.

> dergo a potentially damaging operation. There is usually no time for women to express concern they may have about the abortion procedure. Counseling for patients at the present time is left to the discretion of the abortion clinic director. The doctor need not be involved. One under-cover investigator for the *Chicago Sun-Times* series, Michele Young, was trained at the Biogenetics Clinic not to counsel. She reported that she was told not to tell patients the abortion procedure might hurt. Not to discuss the abortion procedure or its surgical instruments in any detail and not to answer to many questions. The clear implication is that the less the patient knows, the easier it will be to sell her a medical procedure she may not want or need and which may be harmful to her. The Informed Consent Provisions of Senate Bill 47 [Ill. Rev. Stat. ch. 38, 81-23.2 (1981)] are an attempt to redress the almost complete lack of adequate counseling. . . . We must be sure through provision of state provided material that would-be abortion patients are provided with complete, accurate, and free information. . . .
>
> The *Chicago Sun-Times* series has shown us too much of the abuse that results from allowing clinic personnel or abortionists to counsel the women as they please because more often than not, they do nothing.

Illinois General Assembly, House Debates, comments of House Sponsor, Rep. Richard Kelly.

The Constitution does not prevent a state from protecting its citizens by reasonably regulating the practices of the medical profession. Nor do the decisions of this Court indicate otherwise. *See, e.g., Barsky* v. *Board of Regents,* 347 U.S. 442 (1954).

Yet several lower courts have read this Court's decision in *Roe* v. *Wade* to give nearly unfettered discretion to the doctor in consulting with and advising the pregnant woman

on abortion. *See Planned Parenthood Association of Kansas City, Mo.* v. *Ashcroft,* 655 F.2d 848 (8th Cir. 1981); *Akron Center for Reproductive Health* v. *City of Akron,* 651 F.2d 1198 (6th Cir. 1981); *Charles* v. *Carey,* 627 F.2d 772 (7th Cir. 1980).

Clearly this Court never intended such a result. In *Roe* and *Doe,* the Court prohibited the state from regulating doctors only in ways which *burden* the woman's fundamental right to decide. Justice Stevens emphasized that point in *Whalen* v. *Roe,* 429 U.S. 589 (1977). Writing for a unanimous Court, he stated:

> The constitutional right vindicated in *Doe* was the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedures were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision. If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution.

Id. at 605 n.33.

In *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U.S. 748 (1976), the state of Virginia sought to keep certain pricing information from being disseminated. It claimed that this was a permissible means of protecting its citizens. In rejecting the state's arguments, the Court stated that "the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." *Id.* at 769. The Court continued, stating that there is

> [a]n alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well-enough informed, and that the best means to that end is to open the channels of communication rather than close them.

Id. at 770.

Doctors challenging informed consent provisons for prospective abortion patients have claimed that they may protect their patients' best interests by withholding information, no matter how important it is to each woman's decision.* Like the state's paternalism in *Virginia Pharmacy Board,* the doctor's paternalism in this context rests on the supposed advantages of keeping the potential listener in ignorance. As in *Virginia Pharmacy Board,* there is a better alternative to this approach: to assume that factual information is not in itself harmful and that women will perceive their own best interests if only they are well-enough informed.

According to *Virginia Pharmacy Board,* the state clearly could not withhold factual information from women which is essential to their informed decisions in an attempt to shield them from the truth. Since a doctor is a professional, licensed by the state and designated by the state as a party in his or her patients' decision-making processes it follows that the state has the power, if not the duty, to ensure that the doctor does not withhold information material to the outcome of the abortion decision-making process.

---

* Doctors at abortion clinics, where the vast majority of abortions are performed, rarely see their patients before they are on the operating table. These doctors do not personally counsel their patients. Any claim that they would withhold information based on their "best medical judgment" after consideration of their patient's "best interests" is, therefore, disingenuous.

B. Requiring That the Doctor Give Supplementary Factual Information When Counseling a Woman Does Not "Straightjacket" Him In the Practice of His Profession.

The trial records of several cases show that information on fetal development is rarely given to women. In *Planned Parenthood League* v. *Bellotti,* 499 F.Supp. 215, 219 (D.Mass. 1980), for example, the court found that "the clinics and counselors avoid discussion of the state of [fetal] development. . . . One counselor states that she would make every effort to avoid telling the patient about the physical characteristics of the embryo." *See also Planned Parenthood* v. *Danforth,* 428 U.S. 52, 91 n. 2 (1976) (Stewart, J., concurring). Indeed, "counselors" have adopted several euphemistic terms such as "products of conception," "fetal tissue" or "contents of the uterus" to describe the developing fetus.

> For example, in their efforts to discount the value of, or need for this type of information, the plaintiffs' evidence describes the 8 week old embryo as a largely undifferentiated cell mass. (Dr. Emans' Affidavit, Pl. Ex. #10). But the Resource Manual (Pl. Ex. #3) describes and illustrates the 8 week old embyro as largely developed, with head, arms and legs.

Planned Parenthood League v. *Bellotti,* 499 F.Supp. at 219.

In view of such practices, the need for corrective legislation is apparent. It is difficult to imagine how a woman who believes that she is removing an "undifferentiated cell mass" can be aware of the significance of her decision when, in reality, she is causing the death of a "largely developed [embryo], with head, arms and legs."

Although a state may not prohibit a doctor from giving truthful information, it is certainly not prevented from correcting deceptive practices on his part.

This Court's decisions in the area of commercial speech are particularly pertinent here. While "truthful [information] related to the lawful activities" is entitled to First Amendment protection, "[f]alse, deceptive, or misleading [information] remains subject to restraint." *In the Matter of R.M.J.*, 102 S.Ct. 929, 936 (1982). This is especially true in the case of information disseminated by professionals—in this case, doctors. Such information "poses special risks of deception" since the patient's comparative lack of knowledge makes it likely that she will accept the doctor's description as entirely accurate. *Id.* Minors, who account for approximately one-third of abortions performed each year, are especially susceptible in this regard.

Because of the great potential for deception associated with information disseminated by professionals, and the "limited ability of the professions to police themselves," the state has a legitimate and compelling interest in regulating the content of their speech in a manner which prevents such abuses.* *Id.* at 937.

This is especially true in the abortion context, where the woman may be subject to special emotional stresses and where her decision involves waiver of her fundamental right to carry her child to term.

---

* Informed consent provisions do not attempt to limit the doctor's comments about the state-required information. He is free, indeed encouraged, to say what he pleases in addition to the information he is required by law to provide to the woman. *See, e.g.*, Akron, Ohio, Ordinance Number 160 (1978); codified Chap. 1870.06(C).

V.

LOWER COURT DECISIONS WHICH HAVE INVALIDATED INFORMED CONSENT PROVISIONS ARE INCONSISTENT WITH THE DECISIONS OF THIS COURT.

The lower courts which have invalidated informed consent provisions have improperly applied strict scrutiny and required that the state show a compelling interest to justify such provisions.

This Court has ruled on the constitutionality of informed consent provisions in abortion statutes in three cases.

In *Planned Parenthood Association* v. *Fitzpatrick,* 410 F.Supp. 554, 587 (E.D. Pa. 1975), *aff'd sub nom. Franklin* v. *Fitzpatrick,* 428 U.S. 901 (1976), this Court adopted the rational basis test applied by the district court.

Although the court of appeals in *Freiman* v. *Ashcroft,* 584 F.2d 247 (8th Cir. 1978) *aff'd,* 440 U.S. 941 (1979), did not explicitly adopt a rational basis test, its decision is logically consistent with this level of scrutiny. While the court acknowledged the state's legitimate interest in protecting the woman by requiring informed consent, it stated that the Supreme Court does not require physicians to provide "any and all information required by the State, regardless of its legality, truth, constitutionality or medical advisability." 584 F.2d at 251. Since the information required in *Freiman* was "meaningless" and therefore confusing, the court held that it was "not reasonably related to the purpose of informed consent." *Id.* Thus, the information at issue was, in effect, deemed impermissible under the rational basis test.

In *Danforth,* this Court explicitly upheld an informed consent provision which required that a woman certify

"that her consent is informed and freely given and is not the result of coercion." 428 U.S. at 65. This Court held:

> The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned and her awareness of the decision and its significance may be assured, constitutionally, by the State.

428 U.S. at 67.

Some lower courts have made much of footnote 8 of *Danforth* which states:

> We are content to accept as the meaning [of informed consent] the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straightjacket in the practice of his profession.

Id. at 67 n.8.

This language has been interpreted by some courts to mean that only medical information may be required. Others have read it to broadly proscribe any action by the state which might "straightjacket" a doctor in the practice of his profession. Neither interpretation comports with this Court's holdings.

This Court has often recognized that the abortion decision and its consequences are not purely medical. In *Roe*, the Court stated:

> Maternity or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a

> family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

410 U.S. at 153. *See also Harris* v. *McRae,* 448 U.S. 297, 325 (1980) ("[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life"); *Bellotti* v. *Baird,* 443 U.S. 622, 649 ("[t]he abortion decision has implications far broader than those associated with most other kinds of medical treatment"); *Planned Parenthood* v. *Danforth,* 428 U.S. at 103 (Stevens, J., concurring) ("the most significant consequences of the decision are not medical in character").

Indeed, in *Franklin* v. *Fitzpatrick,* 428 U.S. 901 (1976), this Court summarily affirmed a lower court decision which upheld admittedly non-medical information regarding alternatives agencies. Thus, relevant non-medical information clearly may be required.

Moreover, footnote eight of *Danforth* was in response to a claim that "informed consent" was unconstitutionally vague. It was claimed that the Missouri informed consent provision did not give the physician sufficient notice of what he might be prosecuted for. To avoid this challenge, the Court construed "informed consent" to mean "just what would be done and . . . its consequences." 428 U.S. at 67 n.8.

Footnote 8 of *Danforth* does not announce a new principle of jurisprudence, as many lower courts have seemed to think, that the Constitution forbids physicians from being controlled in the practice of their profession.

This Court has, contrary to lower courts, applied principles consistent with the rational basis test to abortion informed consent statutes. That test should be applied in the instant case to the Akron informed consent provisions.

VI.

A SHORT MANDATORY WAITING PERIOD ENHANCES THE WOMAN'S ABILITY TO DECIDE BY ALLOWING HER TIME TO EVALUATE INFORMATION WHICH SHE HAS BEEN GIVEN.

In *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 479 F.Supp. 1172, 1204 (N.D. Ohio 1979). Judge Contie stated:

> Requiring a woman to wait 24 hours between signing the consent form and undergoing an abortion assertedly serves the state's interest in assuring that the abortion decision is made carefully after consideration of all the relevant facts. This is an important state interest considering the irreversible nature and possible lasting consequences of the abortion decision.

In *Planned Parenthood* v. *Bellotti*, 499 F.Supp. 215 (D. Mass. 1980), the district court held that "an informed decision cannot be properly made without sufficient time for reflection." *Id.* at 222. It found that a 24-hour delay was a reasonable amount of time to assure the state's interest in an informed decision. In general, "the abortion decision is somewhat hurriedly arrived at and executed." *Planned Parenthood Association* v. *Fitzpatrick*, 410 F. Supp. at 587. Information concerning alternative agencies and fetal development would have little effect unless the woman were given time to consider that information and to contact other agencies to learn what they have to offer.

Clearly, some waiting period must be permissible. Otherwise, the abortion clinic could merely provide the woman

with information necessary to informed consent while she was already on the operating table, thereby totally frustrating any expression the state's legitimate interest in assuring the integrity of the woman's decision.

Although the 24 hour delay may inconvenience a woman, it does not approach the degree of interference necessary to trigger strict scrutiny. This Court has already permitted similar delays in other cases. In *Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (*Bellotti II*), this Court stated that where a state requires a pregnant minor to obtain parental consent, it must also provide for an alternative judicial hearing whereby authorization for the abortion may be obtained. Even expedited hearings would presumably cause delays of up to 24-48 hours. *See Hodgson* v. *Minnesota*, No. 3-81 Civ. 538, slip op. at 8, 9 (D. Minn. Mar. 23, 1982) (delay in most cases of 24-48 hours). *See also H. L.* v. *Matheson*, 450 U.S. 398 (1981) (reasonable attempts to notify parents of unemancipated immature minor's impending abortion may require at least a 24-hour delay).

States have traditionally ensured the integrity of their citizens' decisions by enforcing mandatory waiting periods. Several states do not consider a woman's consent to the adoption of her child to be valid if given within 72 hours of the child's birth. *See, e.g.*, Ill. Rev. Stat. ch. 40, §1511 (1981); Ohio Rev. Code Ann. §3107.8 (1980). Many states also protect the important decision to marry by requiring that 24 hours elapse between the time the marriage license is obtained and the time it becomes valid. *See, e.g.*, Ill. Rev. Stat. ch. 40, §207 (1981).

Both adoption and marriage decisions, like the decision to abort, implicate the exercise and waiver of fundamental rights. Just as the state might legitimately require a

reasonable waiting period before marriage or adoption, it may require a brief waiting period prior to abortion in order to assure the integrity of the woman's decision.

VII.

EVEN IF STRICT SCRUTINY WERE APPLIED, THE STATE'S COMPELLING INTEREST IN ASSURING THE INTEGRITY OF THE WOMAN'S DECISION WOULD JUSTIFY ITS REGULATIONS WHICH ARE NARROWLY DRAWN TO FURTHER THAT INTEREST.

Even if this Court should hold that abortion informed consent requirements somehow "burden" the right of the woman to decide whether or not to abort, they nevertheless must be upheld because they serve the state's compelling interest in ensuring the integrity of the woman's decision and are narrowly drawn to suit that interest.

1. The State Has a Compelling Interest in Assuring that the Woman's Decision Is Made Intelligently, Knowingly and Voluntarily.

The fundamental right of a pregnant woman to decide the outcome of her pregnancy encompasses two distinct fundamental rights: 1) the right to terminate her pregnancy, and 2) the right to bear her child. Therefore, in exercising one of these fundamental rights, a woman necessarily waives another fundamental right of equal importance. *Maher* v. *Roe*, 432 U.S. 464, 472 n. 7 (1977). The state, consistent with its duty to protect the fundamental rights of its citizens, has a compelling interest in ensuring

that such an important decision is made knowingly, intelligently and voluntarily.*

2. These Informed Consent Provisions Further the State's Compelling Interest and are Narrowly Drawn.

The informed consent provisions are narrowly drawn to serve only the state's interest in assuring that the woman's waiver of one of her contrasting fundamental rights is knowing, intelligent and voluntary. The provisions are designed to make the woman aware of the alternatives to and consequences of her waiver—precisely the information appropriate under the circumstances. The argument that such provisions are not narrowly drawn rests on the assumption that some individuals might already know the information. But if they already know, they can hardly be harmed by simply receiving duplicative information, and a concept of "narrowly drawn" that required a state to tailor its laws for each unique individual would make that requirement utterly incapable of fulfillment. It would be impossible for the state to know beforehand which women know this information and which do not.

---

* *Compare Adams* v. *U.S. ex rel. McCan*, 317 U.S. 269 (1982) ("The fundamental right to assistance of counsel may be waived provided it is done so 'knowingly and intelligently.'") *Carnley* v. *Cochran*, 369 U.S. 506 (1962) (waiver is not to be lightly assumed; it must not be presumed from a silent record); *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (circumstantial evidence of waiver will not suffice). *See also* Fed. R. Crim. Proc. Rule 11 (waiver of right to trial by jury may not be accepted by judge unless he is satisfied that it was made knowingly and intelligently).

VIII.

CONCLUSION

This Court should reverse the decision of the Sixth Circuit, which incorrectly decided the issue of informed consent, and should explicitly rule that informed consent provisions must be reviewed under the rational basis standard. The provisions of the Akron ordinance are constitutional because they are reasonably related to the City's legitimate interest in promoting a knowing, intelligent and voluntary decision. This Court should take this opportunity to explicitly state that informed consent provisions must be reviewed under a rational basis test.

Respectfully submitted,

DOLORES V. HORAN
180 N. LaSalle, #1601
Chicago, Illinois 60601
(312) 822-4554
Attorney for Amicus Curiae, Feminists for Life.

Of Counsel:
Americans United for Life
Legal Defense Fund
230 N. Michigan Avenue, #915
Chicago, Illinois 60601
(312) 263-5029

APPENDIX

ABORTION INFORMED CONSENT LAWS STATE-BY-STATE

1. Delaware

Del. Code Ann. tit. 24 §1794 (Supp. 1980).

Consent prior to termination of human pregnancy.

(a) No abortion may be performed unless the woman submitting to the abortion first gives her written consent to the abortion stating that she freely and voluntarily consents to the abortion and that she has received a full explanation of the abortion procedure and effects, including, but not limited to, the following:

(1) The abortion procedure to be utilized.

(2) The probable effects of the abortion procedure on the woman, including the effects on her child-bearing ability and effects on possible future pregnancies.

(3) The facts of fetal development as of the time the proposed abortion is to be performed.

(4) The risks attendant to the procedure.

(5) An explanation of the reasonable alternatives to abortion and of the reasonable alternative procedures or methods of abortion.

(b) No abortion may be performed on a woman within 24 hours after giving written consent pursuant to subsection (a) of this section unless, in the opinion of her treating physician, an emergency situation presenting substantial danger to the life of the woman exists.

In the event a woman's treating physician determines an abortion is necessary because an emergency situation presenting substantial danger to the life of the woman existed and such woman is unable to give her consent to an abortion, an abortion may be performed on such woman. (62 Del.Laws, c. 171, § 1.)

2. Florida

Fla. Stat. 390.025(2) (Supp. 1981).

(2)An abortion referral or counseling agency, before making a referral or aiding a person in obtaining an abortion, shall furnish such person with a full and detailed explanation of abortion, including the effects of and alternatives to abortion. If the person advised is a minor, a good faith effort shall be made by the referral or counseling agency to furnish such information to the parents or guardian of the minor . No abortion referral or counseling agency shall charge or accept any fee, kickback, or compensation of any nature from a physician, hospital, clinic, or other medical facility for referring a person thereto for an abortion.

3. Idaho

Idaho Code 18-609 (I) (Supp. 1982).

Physicians and hospitals not to incur civil liability—Consent to abortion—Notice.—(1) Any physician may perform an abortion not prohibited by this act and any hospital may provide facilities for such procedures without, in the absence of actual negligence, incurring civil liability therefor to any person, including but not limited to the pregnant woman and the prospective father of the fetus to have been born in the absence of abortion, if consent for such abortion has been duly given by the pregnant woman and, if she be

a married person at the time of conception or at any time during the pregnancy, and that fact is actually known by the physician, and if the said husband has not abandoned her, then by the said husband as well; provided that, in obtaining a valid consent for the performance of such an abortion, the physician shall not be required to possess or claim special expertise but shall, nonetheless, and in his best judgment, advise and counsel such pregnant woman or her husband regarding such matters as possible emotional or psychological consequences of the abortion, the probable health or characteristics of the child otherwise to be born of such pregnancy, the likelihood of such woman becoming pregnant again or of the husband or prospective father again fathering a child, and provided further, if the abortion be within the provisions of section 18-608(3), Idaho Code, and either the pregnant woman or the said husband be for any reason unavailable or unable to give a valid consent therefor, the requirement for that person's consent shall be met as provided by law for other medical or surgical procedures and shall be determined in consideration of the interests, wishes and welfare of the pregnant patient.

4. Illinois

Ill. Rev. Stat. ch. 38, 81-23.2 (1981).

§ 3.2. Informer Consent. (A) No abortion shall be performed except with the voluntary and informed consent of the woman upon whom the abortion is to be performed.

(1) Consent to an abortion is voluntary and informed if and only if:

(a) The woman is provided, at some time before the abortion, with a true copy of her preg-

nancy test result by the physician who is to perform the abortion and the woman is provided, at least 24 hours before the abortion, with the following information by the physician who is to perform the abortion:

(i) The name of the physician who will perform the abortion,

(ii) The particular medical risks associated with the particular abortion procedure to be employed,

(iii) The probable gestational age of the fetus at the time the abortion is to be performed, and

(iv) The printed information prescribed in Section 3.5 of this Law, and

(b) Prior to submitting to the abortion, but subsequent to receiving the information prescribed by paragraph (A)(1)(a) of Section 3.2, the woman certifies in writing that she has received that information from the physician at least 24 hours before the abortion is to be performed, that she understands it, that she consents to the abortion, and that her consent is voluntary and not the result of coercion.

(B) Exceptions.

(1) Waiver of waiting period. The requirement of paragraph (A)(1)(a) of Section 3.2 that at least 24 hours elapse between the provision of the information prescribed and the performance of the abortion shall not apply when, in the medical judgment of the attending physician based on the particular facts of the case before him, there exists a medical emergency which

warrants nullification of the 24 hour waiting period. In such a case, the physician shall describe the basis of his medical judgment that such an emergency exists on a form prescribed by the Department as required by Section 10 of this Law.

(2) Limitation of Informed Consent Requirements. Paragraph (A) of Section 3.2 shall not apply when, in the medical judgment of the attending physician based on the particular facts of the case before him, there exists a medical emergency which warrants nullification of the requirements that the woman be provided with the information prescribed by paragraph (A)(1)(a) of Section 3.2 and that the woman certify her consent as prescribed by paragraph (A)(1)(b) of Section 3.2. In such a case, the physician shall describe the basis of his medical judgment that such an emergency exists on a form prescribed by the Department as required by Section 10 of this Law and, if the woman survives the abortion, the physician shall subsequently inform her of the medical indications for his judgment that a medical emergency existed and of the particular medical risks associated with the particular abortion procedure employed the symptoms of which might become manifest in the future.

(C) Penalty. Any person who intentionally, knowingly or recklessly violates the requirements of Section 3.2 commits a Class B misdemeanor. Failure to provide the woman with information pursuant to the requirements of Section 3.2 is prima facie evidence of failure to obtain informed consent in appropriate civil actions. The law of this State shall not be construed to preclude award of exemplary damages in any appropriate civil action relevant to violations of Section 3.2.

Nothing in Section 3.2 shall be construed to limit the common law rights of the woman to secure informed consent to any form of medical treatment, including abortion.

§ 3.5. Printed Information. The Department shall, within 60 days after Section 3.5 becomes law, cause to be published printed materials that may be easily comprehended in all languages used by significant portions of the population of this State:

(1) Materials designed to inform concerned persons of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including reputable adoption agencies. Such materials shall include a comprehensive list of the agencies available and a description of the manner in which they might be contacted, and

(2) Materials designed to inform concerned persons of the probable anatomical and physiological characteristics of the fetus at the various gestational ages at which abortion might be performed, including any relevant information on the possibility of fetal survival. The following paragraph shall appear at the end of the materials required under this paragraph (2) of Section 3.5:

The State of Illinois wants you to know that in its view the child you are carrying is a living human being whose life should be preserved. Illinois strongly encourages you not to have an abortion but to go through to childbirth. You are being given a list of agencies and services which can help you to continue the pregnancy, and assist you and your child after your child is born, whether you choose to keep your child or to

place her or him for adoption. The State of Illinois strongly encourages you to contact some of them before making a final decision about abortion.

The materials required by paragraph 2 of Section 3.5 shall occupy no more than 3 sheets of 8½" by 11" paper, and shall be printed in a typeface large enough to be clearly legible.

(3) Nothing in Section 3.5 shall be construed to limit the right of the physician or of personnel associated with him to express to the woman their own views concerning the validity or importance of the materials prescribed by Section 3.5. The materials required under Section 3.5 shall be available at no cost from the Department upon request and in appropriate number to any person, facility or hospital.

5. Kentucky

"The Kentucky Abortion Act of 1982," March 17, 1982, Ky. Acts 311.4.

Informed Consent. (A) No abortion shall be performed except with the voluntary and informed consent of the woman upon whom the abortion is to be performed.

(1) Consent to an abortion is voluntary and informed if and only if:

(a) The woman is provided, at some time before the abortion, with a true copy of her pregnancy test result, if such test has been employed, by the physician who is to perform the abortion or his agent and the woman is provided, at least two hours before the abortion, with the following information by the physician who is to perform the abortion or his agent:

(i) The name of the physician who will perform the abortion,

(ii) The particular medical risks associated with the particular abortion procedure to be employed in the medical judgment of the physician based on the particular facts of the case before him,

(iii) The probable gestational age of the fetus at the time the abortion is to be performed,

(iv) The printed information prescribed in Section 5(1) of this Act, and

(v) The fact that the information prescribed by Section 5(2) of this Act is available to her if she should ask to view it, and

(b) Prior to submitting to the abortion, but subsequent to receiving the information prescribed by paragraph (A) (1) (a) of Section 4 the woman certifies in writing that she has received that information from the physician at least two hours before the abortion is to be performed, that she understands it, that she consents to the abortion, and that her consent is voluntary and not the result of coercion.

(B) Exceptions.

(1) Waiver of waiting period. The requirement of Section 4 (A) (1) (a) of Section 3.2 that at least two hours elapse between the provision of the information prescribed and the performance of the abortion and the requirement of Section (A) (1) (b) shall not apply when, in the medical judgment of the attending physician based on the particular facts of the case before him, there exists a medical emergency which warrants nullification of the two hour waiting peirod. In such

a case, the physician shall describe the basis of his medical judgment that such an emergency exists on a form prescribed by the Department as required by Section 8 of this Act.

(2) Limitation of Informed Consent Requirements. Section 4(A) shall not apply when, in the medical judgment of the attending physician based on the particular facts of the case before him, there exists a medical emergency which warrants nullification of the requirements that the woman be provided with the information prescribed by Section 4 (A) (1) (a) and that the woman certify her consent as prescribed by Section 4 (1) (b). In such a case, the physician shall describe the basis of his medical judgment that such an emergency exists on a form prescribed by the Department as required by Section 8 of this Act and, if the woman survives the abortion, the physician shall subsequently inform her of the medical indications for his judgment that a medical emergency existed and of the particular medical risks associated with the particular abortion procedure employed the symptoms of which might become manifest in the future.

"The Kentucky Abortion Act of 1982," March 17, 1982, Ky. Acts 311.5.

Printed Information. The Department for Human Resources shall, within 60 days after Section 4 becomes law, cause to be published printed materials that may be easily comprehended in all languages used by significant portions of the population of this Commonwealth.

(1) Materials designed to inform concerned persons of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including reputable adoption agencies. Such materials shall include a comprehensive list of the agencies available, the services

they offer, and a description of the manner in which they might be contacted. Such materials shall include the following paragraph:

"There are many public and private agencies willing and able to help you to carry your child to term, and assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The Commonwealth of Kentucky strongly urges you to contact them before making a final decision about abortion," and

(2) Materials designed to inform concerned persons of the probable anatomical and physiological characteristics of the fetus at the various gestational ages at which abortion might be performed, including any relevant information on the possibility of fetal survival. The materials shall be scientifically objective and shall not be prejudicial.

(2) Nothing in Secion 5 shall be construed to limit the right of the physician or of personnel associated with him to express to the woman their own views concerning the validity or importance of the materials prescribed by Section 5. The materials required under Section 5 shall be available at no cost from the Department for Human Resources upon request and in appropriate number to any person, facility or hospital. Distribution of the printed materials of Section 5 pursuant to Section 4 of this Act shall not be required until or unless they are made available.

6. Louisiana

La. Rev. Stat. Ann. §40:1299.35.6 (West Supp. 1981).

A. No abortion shall be performed or induced without the informed, written consent of the pregnant woman, given freely and without coercion.

B. In order to insure that the pregnant woman is able to give her informed consent, the attending physi-

cian, prior to performing or inducing the abortion, shall orally inform the pregnant woman of the facts set forth in this Subsection and shall require the signature of the woman on a consent form wherein she acknowledges that she has been informed:

(1) That, according to the best judgment of the attending physician, she is pregnant.

(2) Of the number of weeks which have elapsed from the probable time of the conception of the unborn child, based on the information provided by her as to the time of her last menstural period or based upon a history, physical examination, and appropriate laboratory tests.

(3) Of the anatomical and physiological development of the particular unborn child at the time the abortion is to be performed or induced, according to the best medical judgment of the attending physician.

(4) That the unborn child is viable, or not viable, according to the best medical judgment of the attending physician.

(5) Of the type of method or technique which will be utilized in the abortion, the means of effectuating the method or technique, and the medical risks and consequences of the method or technique to be utilized.

(6) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and services.

(7) That locations of public mental health agencies shall be available to the patient if and when postpartum psychological damage requires professional attention.

C. At the same time the attending physician provides the information required by Subsection B of this Section, he shall, at least orally, inform the pregnant woman of the particular risks associated with her own pregnancy and the abortion technique to be employed, including providing her, at a minimum, with a general description of the medical instructions to be followed after the abortion in order to insure her safe recovery, and, in addition, shall provide her with such other information as in his own medical judgment is relevant to her decision as to whether to have an abortion or to carry her pregnancy to term.

D. The attending physician performing or inducing the abortion shall provide the pregnant woman with a copy of the consent form signed by her in accordance with Subsection B of this Section.

7. Maine

Me. Rev. Stat. Ann. tit. 22, §1599 (Supp. 1981).

1. *Consent by the woman.* No physician shall perform an abortion unless, prior to the performance, the attending physician certifies in writing that the woman gave her informed written consent freely and without coercion. He shall also certify that, not less than 48 hours prior to her consent, he informed the woman of the information contained in subsection 2. He shall further certify in writing the pregnant woman's age based upon proof of age offered by her.

2. *Informed consent.* In order to insure that the consent for an abortion is truly informed consent, the attending physician shall inform the woman in a manner which, in his professional judgment, is not misleading and which will be understood by the patient, of at least the following:

A. According to his best judgment she is pregnant;

B. The number of weeks elapsed from the probable time of the conception;

C. The particular risks associated with her own pregnancy and the abortion technique to be performed; and

D. Alternatives to abortion such as childbirth and adoption and information concerning public and private agencies that will provide the woman with economic and other assistance to carry the fetus to term, including, if the woman so requests, a list of these agencies and the services available from each.

3. *Exception.* The 48-hour period required in subsection 1 shall not be required if an abortion is immediately necessary to preserve the life or health of the pregnant women.

8. Maryland

Md. Ann. Code art. 43, §138 (1980).

Information to be provided before abortion.

(a) Before a physician performs an abortion the woman undergoing the procedure shall be advised of:

(1) The extent to which financial and other material assistance to carry the pregnancy to a normal delivery is available;

(2) The extent to which financial and other material assistance to raise and support her child is available; and

(3) The extent to which assistance from licensed and regulated adoption agencies is available if she chooses not to keep the baby.

(b) The Department of Human Resources in cooperation with the Department of Health and Mental Hygiene shall annually prepare, periodically update, and publish a list of federal, State, and private sources of the types and extent of assistance referred to in subsection (a), and shall distribute this published information to all hospitals, clinics, physicians' offices, and other facilities where abortions are performed.

(c) The signing of a document by a person seeking an abortion indicating that she has been counselled concerning the published information referred to in subsection (b) shall be evidence that the requisite information was given to the person. The signed document shall become part of the medical record.

(d) This section does not apply when it is certified by the attending physician that abortion is necessary to save the life of the pregnant woman.

(e) Any person who willfully violates the provisions of subsection (a), is guilty of a misdemeanor and upon conviction is subject to a fine of not more than $500.

9. Massachusetts

Mass. Ann. Laws ch. 112, §12S (Michie/Law, Co-op. Supp. 1982).

Informed Consent of Mother for Abortion; Consent of Parents or Guardian or Court Order for Abortion if Mother is Less Than Eighteen

No physician may perform an abortion upon a pregnant woman without first obtaining her written informed consent. The commissioner of public health shall prescribe a form for physicians to use in obtaining such consent. This form shall be written in a manner designed to permit a person unfamiliar with medical terminology to understand its purpose and content, and shall include the following information: a description of the stage of development of the unborn child; the type of procedure which the physician intends to use to perform the abortion; and the possible complications associated with the use of the procedure and with the performance of the abortion itself; the availability of alternatives to abortion; and a statement that, under the law of the commonwealth, a person's refusal to undergo an abortion does not constitute grounds for the denial of public assistance. A pregnant woman seeking an abortion shall sign the consent form described above at least twenty-four hours in advance of the time for which the abortion is scheduled, except in an emergency requiring immediate action. She shall then return it to the physician performing the abortion who shall maintain it in his files and destroy it seven years after the date upon which the abortion is performed.

The said consent form and any other forms, transcript of evidence, or written findings and conclusions of a court, shall be confidential and may not be released

to any person except by the pregnant woman's written informed consent or by a proper judicial order, other than to the pregnant woman herself, to whom such documents relate, the operating physician, or any person whose consent is required pursuant to this section, or under the law. If a pregnant woman is less than eighteen years of age and has not married, a physician shall not perform an abortion upon her unless he first obtains both the consent of the pregnant woman and that of her parents, except as hereinafter provided. In deciding whether to grant such consent, a pregnant woman's parents shall consider only their child's best interests. If one of the pregnant woman's parents has died or is unavailable to the physician within a reasonable time and in a reasonable manner, consent of the remaining parent shall be sufficient. If both parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, consent of the pregnant woman's guardian or guardians shall be sufficient. If the pregnant woman's parents are divorced, consent of the parent having custody shall be sufficient. If a pregnant woman less than eighteen years of age has not married and if one or both of her parents or guardians refuse to consent to the performance of an abortion, or if she elects not to seek the consent of one or both of her parents or guardians, a judge of the superior court department of the trial court shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion or, if said judge determines that she is not mature, that the performance of an abortion upon her would be in her best interests.

A pregnant woman less than eighteen years of age may participate in proceedings in the superior court department of the trial court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel. Proceedings in the superior court department of the trial court under this section shall be confidential and shall be given such precedence over other pending matters that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the superior court department of the trial court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting his decision and shall order a record of the evidence to be maintained including his own findings and conclusions.

Nothing in this section is intended to abolish or limit any common law rights of persons other than those whose rights it governs for the purpose of any civil action or any action for injunctive relief under section twelve.

10. Minnesota

Minn. Stat. Ann. §145.412(1)(4) (West. Supp. 1981).

It shall be unlawful to wilfully perform an abortion unless the abortion is performed . . . with the consent of the woman submitting to the abortion after a full explanation of the procedure and effect of the abortion.

11. Missouri

Mo. Ann. Stat. §188.039 (Vernon Supp. 1982).

Consent, form, content—coercion prohibited—woman to be informed of certain facts, when

1. No physician shall perform an abortion unless, prior to such abortion, the physician certifies in writing that the woman gave her informed consent, freely and without coercion, after the attending physician had informed her of the information contained in subsection 2 of this section not less than forty-eight hours prior to her consent to the abortion, and shall further certify in writing the pregnant woman's age, based upon proof of age offered by her.

2. In order to insure that the consent for an abortion is truly informed consent, no abortion shall be performed or induced upon a pregnant woman unless she has signed a consent form that shall be supplied by the state division of health, acknowledging that she and, if she is a minor, her parent or legal guardian or person standing in loco parentis have been informed by the attending physician of the following facts:

(1) That according to the best medical judgment of her attending physician she is pregnant;

(2) The number of weeks elapsed from the probable time of conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period and after a history and physical examination and appropriate laboratory tests;

(3) The probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed;

(4) The immediate and long-term physical dangers of abortion and psychological trauma resulting from abortion and any increased incidence of premature births, tubal pregnancies and stillbirths following abortion;

(5) The particular risks associated with the abortion technique to be used;

(6) Alternatives to abortion shall be given by the attending physician, including a list of public and private agencies and services that will assist her during her pregnancy and after the birth of her child.

3. The physician may inform the woman of any other material facts or opinions, or provide any explanation of the above information which, in the exercise of his best medical judgment, is reasonably necessary to allow the woman to give her informed consent to the proposed abortion, with full knowledge of its nature and consequences.

12. Montana

Mont. Code Ann. §50-20-104(3) (1981).

Definitions. As used in this chapter, the following definitions apply:

. . . (3) "Informed consent" means voluntary consent to an abortion by the woman upon whom the abortion is to be performed only after full disclosure to her by the physician who is to perform the abortion of such of the following information as is reasonably chargeable to the knowledge of the physician in his professional capacity:

(a) the stage of development of the fetus, the method of abortion to be utilized, and the effects of such abortion method upon the fetus;

(b) the physical and psychological effects of abortion; and

(c) available alternatives to abortion, including childbirth and adoption.

Mont. Code Ann. §50-20-106 (1981).

Consent to abortion. (1) No abortion may be performed upon any woman in the absence of informed consent.

(2) Informed consent may be evidenced by a written statement in a form prescribed by the department and signed by the physician and the woman upon whom the abortion is to be performed in which the physician certifies that he has made the full disclosure provided in 50-20-104(3) and in which the woman upon whom the abortion is to be performed acknowledges that the above disclosures have been made to her and that she voluntarily consents to the abortion.

(3) The above informed consent or consent is not required if a licensed physician certifies the abortion is necessary to preserve the life of the mother.

(4) No executive officer, administrative agency, or public employee of the state or of any local governmental body has power to issue any order requiring an abortion or shall coerce any woman to have an abortion, nor shall any person coerce any woman to have an abortion.

(5) Violation of subsections (1) and (4) of this section is a misdemeanor.

13. Nebraska

Neb. Rev. Stat. §28-326 (1981).

Definitions:

. . . (8) Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, (b) of possible alternatives to abortion, including childbirth and adoption and including that there are agencies and services available to assist her to carry her pregnancy to a natural term, and (c) of the abortion procedures to be used. Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician.

Neb. Rev. Stat. §28-327 (1981).

Abortion; informed consent required; waiting period; exception. No abortion shall be performed on any woman in the absence of an informed consent, except that an abortion may be performed if, in the sound medical judgment of the physician, an emergency presents imminent peril that substantially endangers the life of the woman and the woman is unable to give informed consent.

No abortion shall be performed on any woman without the passing of at least forty-eight hours between

the expression of informed consent and the actual performance of the abortion unless, in the sound medical judgment of the physician, an emergency situation exists.

14. Nevada

Nev. Rev. Stat. §442.253 (1981).

Requirements for informed consent.

1. The attending physician shall accurately and in a manner which is reasonably likely to be understood by the pregnant woman:

(a) Explain that in his professional judgment, she is pregnant and a copy of her pregnancy test is available to her.

(b) Inform her of the number of weeks which have elapsed from the probable time of conception.

(c) Explain any known immediate and long-term physical or psychological dangers resulting from abortion including an increase in the incidence of premature births, tubal pregnancies and stillbirths.

(d) Explain the general nature and the extent of the particular risks associated with her pregnancy.

(e) Describe the medical procedure to be used.

(f) Present any alternatives to abortion including a list of public and private agencies that provide pregnant women with economic and other assistance and the services provided by each agency

(g) Explain that if the child is aborted is alive, the physician has a legal obligation to take all reasonable steps to preserve the life and health of the child.

(h) Present any other material facts which, in his professional judgment, are necessary to allow the woman to give her informed consent.

2. If the woman does not understand English, the form indicating consent must be written in a language understood by her, or the attending physician shall certify on the form that the information required to be given has been presented in such a manner as to be understandable by her. If an interpreter is used, the interpreter must be named and reference to this use must be made on the form for consent.

15. North Dakota

N.D. Cent. Code §14-02.1-02(5).

Definitions.

. . . 5. "Informed consent" means voluntary consent to abortion by the woman upon whom the abortion is to be performed only after full disclosure to her by the physician who is to perform the abortion of as much of the following information as is reasonably chargeable to the knowledge of the physician in his professional capacity:

a. According to the best judgment of her attending physician, she is pregnant.

b. The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or based upon a history and physical examination and appropriate laboratory tests.

c. The probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed.

d. The immediate and long-term physical dangers of abortion, psychological trauma resulting from abortion, sterility and increases in the incidence of premature births, tubal pregnancies and still-births in subsequent pregnancies, as compared to the dangers in carrying the pregnancy to term.

e. The particular risks associated with her own pregnancy and the abortion technique to be performed.

f. Alternatives to abortion such as childbirth and adoption and information concerning public and private agencies that will provide the woman with economic and other assistance and encouragement to carry her child to term including, if the woman so requests, a list of the agencies and the services available from each.

g. In cases where the fetus may reasonably be expected to have reached viability and thus be capable of surviving outside of her womb, the attending physician shall inform the woman of the extent to which he is legally obligated to preserve the life and health of her viable unborn child during and after the abortion.

In addition, the physician may inform the woman of any other material facts or opinions or provide any explanation of the above information which, in the exercise of his best medical judgment, is reasonably necessary to allow the woman to give her informed consent to the proposed abortion, with full knowledge of its nature and consequences.

Informed consent shall be evidenced by a written statement, in the form prescribed by the state department of health and approved by the attorney general,

signed by the physician and the woman upon whom the abortion is to be performed, in which statement the physician certifies that he has made the full disclosure provided above; and in which statement the woman upon whom the abortion is to be performed acknowledges that the above disclosures have been made to her and that she voluntarily consents to the abortion.

Informed consent shall not be required in the event of a medical emergency when the woman in incapable of giving her consent if a licensed physician certifies the abortion is necessary to prevent her death.

16. Ohio

Ohio Rev. Code Ann. §2919.12(A) (Page 1982).

No person shall perform or induce an abortion without the informed consent of the pregnant woman.

17. Oklahoma

Okla. Stat. Ann. tit. 63, §1-736 (West Supp. 1981-1982). *Hospitals — Advertising of Counseling to Pregnant Women.*

No hospital in which abortions are performed or induced shall advertise or hold itself out as providing counseling to pregnant women, unless:

1. The counseling is done by a licensed physician, a licensed registered nurse or by a person holding at least a bachelor's degree from an accredited college or university in psychology or some similarly appropriate field;

2. The counseling includes factual information, including explicit discussion of the development of the unborn child; and

3. The counseling includes a thorough discussion of the alternatives to abortion and the availability of agencies and services to assist her if she chooses not to have an abortion.

18. Pennsylvania

Act of June 15, 1982 Pa. Laws

A. *Informed Consent*—No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(1) The woman is provided, at least 24 hours before the abortion, with the following information by the physician who is to perform the abortion or by the referring physician but not by the agent or representative of either;

(i) The name of the physician who will perform the abortion.

(ii) The fact that there may be detrimental physiological and psychological effects which are not foreseeable.

(iii) The particular medical risks associated with the particular abortion procedure to be employed including, where medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility.

(iv) The probable gestational age of the unborn child at the time the abortion is to be performed.

(v) The medical risks associated with carrying the child to term.

(2) The woman is informed, by the physician or agent, at least 24 hours before the abortion:

(i) of the fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care;

(ii) of the fact that the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion;

(iii) and, that she has the right to review the printed materials described in §3208 (related to printed information). The physician or agent shall orally inform the woman that the material describes the unborn child and lists agencies which offer alternatives to abortion. If the woman chooses to view the material, copies of them will be furnished to her. If the woman is unable to read the material furnished to her, the material shall be read to her. If the woman seeks answers to questions concerning any of the information and materials, answers shall be provided in her own language.

(3) The woman certifies in writing, prior to the abortion, that the information described in (1) and (2) has been furnished to her, and that she has been informed of her opportunity to review the information referred to in paragraph (2).

(4) Prior to the performance of an abortion, the physician who is to perform or induce the abortion or his agent receives the copy of the written certification described by paragraph (3).

B. *Emergency*—Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, that an abortion is necessary to avert her death.

C. *Penalty*—Any physician who violates the provisions of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the Act of July 20, 1974, (P.L. 551, No. 190), known as the "Medical Practice Act of 1974." Any other person obligated under this chapter to give information relating to informed consent of a woman before an abortion is performed, and who fails to give such information, shall for the first offense be guilty of a summary offense and, for each subsequent offense, be guilty of a misdemeanor of the second degree.

D. *Limit on Civil Liability*—Any physician who complies with provisions of this section may not be held civilly liable to his patient for failure to obtain informed consent to the abortion within the meaning of that term as defined by the Act of October 15, 1975.

20. Rhode Island

R.I. Gen. Laws §23-4.7-2 (1981).

Required disclosure—In order to insure that the consent of the pregnant woman is truly informed consent, an abortion shall be performed only after the woman has signed a consent form acknowledging that she has been informed by the physician who is to perform the abortion as follows:

(1) That she is pregnant and a copy of her pregnancy test is available to her.

(2) That the nature of an abortion has been fully explained, including the probable gestational age of the fetus at the time the abortion is to be performed.

(3) That the medical or surgical procedure to be used has been explained, to include all medical risks, both physical and psychological, associated with the particular abortion procedure to be employed, consistent with good medical practice.

(4) That the printed information prescribed in §23-4.7-4 is available, if in fact it has been made available by the department of health.

(5) That the woman be informed of all medical risks, both physical and psychological, to herself and the fetus, associated with the alternative of carrying the fetus to term, consistent with good medical practice.

In addition, the physician may inform the woman of any other material facts or opinions or provide any explanation of the above information, which in the exercise of his best medical judgment, is reasonably necessary to allow the woman to give her informed consent to the proposed abortion, with full knowledge of its nature and consequences.

In cases where the woman does not understand English, either the consent form shall be written in a language understood by her, or the physician informing her shall certify on the consent form that in his or her opinion, the information required in this section has been given in such a manner as to be understandable by her; if an interpreter is used, the interpreter shall be named and reference to such use shall be made on the consent form.

R.I. Gen. Laws §23-4.7-4 (1981).

Printed information—The department of health shall, within sixty (60) days after this section becomes law, cause to be published, printed materials that may be easily comprehended in all languages used by significant portions of the population of this state:

(1) Materials designed to inform concerned persons of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including a comprehensive list of the agencies available and a description of the manner in which they might be contacted; and,

(2) Materials designed to inform concerned persons of the probable anatomical and physiological characteristics of the fetus at the various gestational ages at which abortion might be performed, including any relevant information on the possibility of fetal survival.

21. South Dakota

S.D. Codified Laws Ann. §34-23A-10 (1977).

Information and counseling required of physicians and facilities—Alternative solutions. All physicians performing abortions and facilities wherein abortions are performed shall make available to all women seeking abortions from them, upon request, information concerning professional social service and counseling service agencies in the state which provide a full spectrum of alternative solutions for problem pregnancies.

S.D. Codified Laws Ann. §34-23-A-10.1 (Supp. 1981).

Statement of informed consent—Physician's duties—Signature—Copies. At least twenty-four hours before an abortion is scheduled on a woman, unless, in the

best medical judgment of the attending physician based upon the particular facts of the case before him, an emergency situation presents imminent peril substantially endangering the life of the woman, the physician shall request that she sign the following statement which shall be provided by the department of social services:

> "This is to advise you that you have many alternatives to abortion. One such alternative is adoption. Many qualified persons are unable to adopt because there are not enough children available. If you decide to carry your baby to term and place it for adoption, financial assistance may be available to you. Financial assistance may also be available to you if you decide to keep your child. You may learn more about your choices, and you may apply for benefits at ———— (place and telephone number of nearest social service offices).
>
> ————————————
>
> (signature of the pregnant woman)"

If the woman refuses to sign this statement, the physician or his designee shall read the statement to her, note that fact on the statement, and then sign the statement himself. A copy of the statement shall be given to the woman. . . .

22. Tennessee

Tenn. Code Ann. §39-302 (Supp. 1981).

Consent of pregnant woman required prior to abortion —Information provided by doctor—Waiting period—Penalty for violation—Requirements inapplicable in certain cases.-(a) an abortion otherwise permitted by law shall be performed or induced only with the

informed written consent of the pregnant woman, given freely and without coercion. Such consent shall be treated as confidential.

(b) In order to insure that a consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she has been orally informed by her attending physician of the following facts and has signed a consent form acknowledging that she has been informed as follows:

(1) That according to the best judgment of her attending physician she is pregnant.

(2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history, physical examination, and appropriate laboratory tests.

(3) That if more than twenty-four (24) weeks have elapsed from the time of conception, her child may be viable, that is, capable of surviving outside of the womb, and that if such child is prematurely born alive in the course of an abortion her attending physician has a legal obligation to take steps to preserve the life and health of the child.

(4) That abortion in a considerable number of cases constitutes a major surgical procedure.

(5) That numerous public and private agencies and services are available to assist her during her pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests.

(6) Numerous benefits and risks are attendant either to continued pregnancy and childbirth or to abortion depending upon the circumstances that the patient might find herself in. The physician shall explain these benefits and risks to the best of his ability and knowledge of the circumstances involved.

(c) At the same time the attending physician provides the information required by subsection (b) of this section, he shall inform the pregnant woman of the particular risks associated with her pregnancy and childbirth and the abortion or child delivery technique to be employed, including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion or childbirth in order to insure her safe recovery.

(d) There shall be a two (2) day waiting period after the physician provides the required information, excluding the day on which such information was given and on the third day following the day such information was given, the patient may return to the physician and sign a consent form.

Any physician who performs an abortion or attempts to perform an abortion in violation of the provisions of this subsection shall be punished by imprisonment in the penitentiary for not less than one (1) nor more than three (3) years.

Provided, however, that this subsection (d) shall not apply when the attending physician, utilizing his experience, judgment, or professional competence, determines that a two (2) day waiting period or any waiting period would endanger the life of the pregnant woman.

This provision shall not relieve the attending physician of his duty to the pregnant woman to inform her

of the facts under subsection (b) of this section. Such determination made by the attending physician shall be in writing and shall state his medical reasons upon which he bases his opinion that the waiting period would endanger the life of the pregnant woman.

(e) The attending physician performing or inducing the abortion shall provide the pregnant woman with a duplicate copy of the consent form signed by her.

(f) The attending physician or agency performing an abortion upon a minor of less than eighteen (18) years of age shall inform the parents or legal guardians of such minor, or if the whereabouts of the parents cannot be determined and there is no other legal guardian than the agency or other individual to whom the child's custody has been transferred, two (2) days prior to the operation that an abortion is to be performed upon such minor. Provided, however, the provisions of this section shall in no way be construed to mean, provide for, or authorize parental objection to, in any way, prevent or alter the decision of the minor to proceed with the abortion. Notice shall not be required if:

(1) The minor is emancipated by marriage; or

(2) The attending physician determines that, in his best medical judgment, the abortion is necessary to preserve the life or health of the mother and must be performed prior to the expiration of the two (2) day notice period.

(g) The words "the physician" and "the attending physician" as used in this section shall mean any licensed physician on the service treating the pregnant woman.

(h) The provisions of this section shall not apply in those situations where an abortion is certified by a licensed physician as necessary to preserve the life of the pregnant woman.

23. Utah

Utah Code Ann. §76-7-305 (1979).

Consent requirements for abortion. (1) No abortion may be performed unless a voluntary and informed written consent is first obtained by the attending physician from the woman upon whom the abortion is to be performed.

(2) No consent obtained pursuant to the provisions of this section shall be considered voluntary and informed unless the attending physician has informed the woman upon whom the abortion is to be performed:

(a) Of the names and addresses of two licensed adoption agencies in the state of Utah and the services that can be performed by those agencies, and nonagency adoption may be legally arranged; and

(b) Of the details of development of unborn children and abortion procedures, including any forseeable complications, risks, and the nature of the postoperative recuperation period; and

(c) Of any other factors he deems relevant to a voluntary and informed consent.

Utah Code Ann. §76-7-305.5 (Supp. 1981).

Information to be furnished to pregnant woman prior to abortion—Exceptions. (1) In order to insure that the consent to an abortion is truly informed consent, the department of health shall cause to be published

easily comprehended printed materials to be made available at no cost to any person upon request and which shall contain the following:

(a) Descriptions of the services available to assist a woman through pregnancy, at childbirth, and while the child is dependent, including adoption services, a comprehensive list of the names, addresses, and telephone numbers of public and private agencies that provide such services and financial aid available;

(b) Descriptions of the physical characteristics of a normal unborn child, described at two-week intervals, beginning with the fourth week and ending with the twenty-fourth week of development, accompanied by scientifically verified photographs of an unborn child during such stages of development. The descriptions shall include information about physiological and anatomical characteristics, brain and heart function, and the presence of external members and internal organs during the applicable stages of development; and

(c) Descriptions of abortion procedures used in current medical practice at the various stages of growth of the unborn child including, (sic) the surgical procedure to be used and any reasonably foreseeable complications and risks to the mother, including those related to subsequent childbearing.

(2) No abortion shall be performed unless, prior to the abortion, the attending physician certifies in writing that the materials referred to in subsection (1) of this section have been provided to the woman, if possible, at least 24 hours before performance of the abortion.

(3) This section is inapplicable to an abortion if the department certifies in writing that the materials referred to in subsection (1) are not presently available.

If any provision of this section is invalidated by a court, it shall not affect the validity of the balance of its provisions.

(4) When due to a serious medical emergency, time does not permit compliance with subsection 76-7-305.5(2), the provisions of that subsection shall not apply.

24. Virginia

Va. Code. 18.2-76 (1982).

Informed consent required.—Before performing any abortion or inducing any miscarriage or terminating a pregnancy as provided for in §§ 18.2-72, 18.2-73 or 18.2-74, the physician shall obtain the informed written consent of the pregnant woman; provided, however, if such woman shall be incompetent as adjudicated by any court of competent jurisdiction or if the physician knows or has good reason to believe that such woman is incompetent as adjudicated by a court of competent jurisdiction, then only after permission is given in writing by a parent, guardian, committee, or other person standing in loco parentis to such incompetent, may the physician perform such abortion or otherwise terminate the pregnancy.

The physician shall inform the pregnant woman of the nature of the proposed procedure to be utilized and the risks, if any, in her particular case to her health in terminating or continuing the pregnancy. (Code 1950, § 18.1-62.1; 1970, c. 508; 1972, c. 823; 1975, cc. 14, 15; 1979, c. 250.)